File: A26 303 064 - Aurora

Date: JAN 17 1997

In re: OLYMPIO TETEVI MARTINS a.k.a. Gener Manila

IN DEPORTATION PROCEEDINGS

INDEX

MOTION

ON BEHALF OF RESPONDENT: Alan M. Anzarouth, Esquire
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ON BEHALF OF SERVICE: Elizabeth R. Posont
General Attorney

CHARGE:

Order: Sec. 241(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1251(a)(2)(A)(ii)] - Crimes involving moral turpitude

APPLICATIONS: Reopening

This case was last before us on March 15, 1994, when we dismissed the respondent's motion to reopen his deportation proceedings in order to apply for a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h). The respondent has filed a motion to reopen his deportation proceedings in order to apply for adjustment of status under section 245(a) of the Act, 8 U.S.C. § 1255(a). The Immigration and Naturalization Service opposes the motion. The motion will be denied.

Motions to reopen in deportation proceedings will not be granted unless the respondent can show that the evidence sought to be offered is material and was not available at his former hearing. 8 C.F.R. § 3.2. A motion to reopen shall state the new facts to be proved and shall be supported by affidavits or other evidentiary material. 8 C.F.R. § 3.8. A motion to reopen also will not be granted if the respondent does not establish a prima facie case of eligibility for the underlying relief sought. See INS v. Abudu, 485 U.S. 94 (1988). Finally, in cases involving discretionary relief from deportation, the Board may deny a motion to reopen solely in the exercise of discretion by concluding that "the movant would not be entitled to the discretionary grant of relief." Id. at 105; see also INS v. Doherty, 502 U.S. 314 (1992); INS v. Rios-Pineda, 471 U.S. 444 (1985); Matter of Coelho, 20 I&N Dec. 464 (BIA 1992).

In order to be eligible for adjustment of status under section 245 of the Act, an alien must establish that an immigrant visa is immediately available to him and that he is admissible to the

United States for permanent residence. The respondent has presented evidence that he is eligible to receive an immigrant visa and that it is immediately available to him as evidenced by the approval notice submitted. The respondent, however, would be inadmissible to the United States because of his prior convictions in 1991 for second degree forgery, forgery, and obtaining by fraud. See section 212(a)(2)(A)(i) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i). To qualify for adjustment therefore, the respondent must obtain a waiver of excludability under section 212(h) of the Act. Although the respondent in the instant case has a United States citizen wife and would be inadmissible under section 212(a)(2)(A)(i) of the Act based on his convictions, he is ineligible for relief under section 212(h) relief if his deportation proceedings were reopened.

As we noted in Matter of Yeung, Interim Decision 3297 (BIA 1996), Congress has acted to clearly bar this respondent from obtaining section 212(h) relief. Under section 348(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009,_ ("IIRIRA"), section 212(h) of the Immigration and Nationality Act has been amended to provide, in pertinent part, that "[n]o waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if . . . since the date of such admission the alien has been convicted of an aggravated felony . . . ."

The respondent in this case is a native and citizen of Nigeria who entered the United States on March 5, 1988, as a lawful permanent resident. He was convicted in the State of Colorado on August 30, 1991, of the offense of second degree forgery. He was sentenced to serve over 3 years' imprisonment. The respondent was also convicted in the State of Wyoming on December 18, 1991, of the offense of forgery and obtaining by fraud. He was sentenced to serve a concurrent maximum of 5 years and a minimum of 3 years' of imprisonment. Additionally, the Wyoming terms of imprisonment were to be served concurrent with his Colorado term of imprisonment. He was subsequently placed in deportation proceedings and was found deportable based on these convictions. This Board affirmed the Immigration Judge's decision on March 11, 1993.

Under section 101(a)(43)(R), 8 U.S.C. § 1101(a)(43)(F) (1996), as amended by sec. 321(a) of the IIRIRA, 110 Stat. at __, an aggravated felony is defined to include an offense relating to forgery for which the term of imprisonment is at least 1 year. The new definition of the term applies to convictions entered before, on, or after the date of enactment. Section 321(b) of the IIRIRA. The respondent has been convicted of an offense related to forgery and sentenced to over a year s imprisonment for the crime. He thus has been convicted of an aggravated felony.

Further, we find that the new version of section 212(h) applies to the present motion. Section 348(b) of the IIRIRA, 110 Stat. at._, provides that the amendment to section 212(h) "shall be effective on the date of this Act and shall apply to the case of any alien who is in exclusion or deportation proceedings as of such date unless a final administrative order in such proceedings has

been entered as of such date." Although the respondent's order of deportation became a final administrative order on March 11, 1993, when we dismissed the respondent's appeal of an Immigration Judge's order, we are of the opinion that the language addressing final administrative orders is intended to protect a final administrative order granting section 212(h) relief prior to September 30, 1996. Moreover, if we were to reopen the respondent's deportation proceedings, there would no longer be a final administrative order. Then, the respondent would become subject to the amended provisions of section 212(h).

For these reasons, the respondent has failed to demonstrate a prima facie case for the relief requested. Accordingly, his motion to reopen will be denied.

ORDER: The motion is denied.

FOR THE BOARD